Gilbert Engineering Co, Inc v Zainuddin bin Ahmad & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-4822 OF 1998(2)
VINCENT NG J
12 APRIL 2003

Civil Procedure *— Summary judgment — Delay in application for summary judgment — Application for summary judgment made three months after the defendant entered appearance and two months after filing of defence — Whether satisfactory explanation given*

Civil Procedure *— Summary judgment — Affidavit — English affidavits — Whether affidavits adduced in the form of exhibits — Whether application for summary judgment may be moved through exhibits in support — Rules of the High Court 1980 O 14 and O 92 r 1*

Civil Procedure *— Summary judgment — Affidavit — Authenticity of affidavits — Whether plaintiff discharged onus of ensuring the authenticity of affidavits — Defects of substance detected — Rules of the High Court 1980 O 41 r 4*

The plaintiff's claim against the sixth defendant was for the return US$617,756.37, being monies received from the plaintiff's customer and wrongfully retained by the sixth defendant and a sum of US$501.37 for goods sold and delivered. At the onset, the sixth defendant raised preliminary objections to defeat the plaintiff's application for summary judgment. The learned senior assistant registrar allowed the preliminary objections raised by the sixth defendant and struck off with costs the plaintiff's application for summary judgment. The plaintiff appealed to this court.

Held, dismissing the appeal:

(1) The plaintiff only took out their summary judgment application three months after the sixth defendant entered appearance and two months after the filing of the defence. Having commenced the suit against the defendants, presumably with instructions to apply for summary judgment supported by affidavits to be secured from USA, the plaintiff should have prepared all the relevant documents for the expeditious conduct of their case. This was of material consideration in the light of the present day litigation culture which enjoins speedy disposal of cases. The plaintiff had failed to discharge the onus on them to show that the delay was justified under the circumstances of their case (see p 107D, G–I); *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134 followed.

(2) The plaintiff had attempted to use what were essentially exhibits, as affidavits in support of their application. The sole affidavit tendered in support of the application was the affidavit sworn by

the lawyer. The Rules of High Court 1980 ('RHC') has no provision that allows affidavits to be adduced in the form of exhibits, and neither is there any provision to permit a plaintiff to move the court in an O 14 application through exhibits in support of the application. To allow such affidavits to be read in support of the plaintiff's summary judgment application would run counter to the grain of the pertaining provision itself (see pp 108H–109A, 111F–G).

(3) The onus was on the plaintiff to ensure the authenticity of the affidavits before any dispute arose, and this they failed to do. Though it is open to the plaintiff to apply for leave of the court under O 41 r 4 to use such defective affidavit in evidence, yet the onus rests on them to make out a cogent case for such leave, which could be granted, depending on the nature and number of and the reasons for such non-compliance of form or format. Rule 4 of this provision may not be invoked to cure a defect or error in the substantive averments of the affidavit which go to the root of the affidavit, as this rule does not empower the court with any such discretion (see p 109E–G).

(4) Defects of substance and not of form only were also detected. This affidavit bears an illegal amendment and appeared to have been tampered with. This being so, even if an application had been made for leave to use this affidavit under O 41 r 4 RHC it should not be allowed by the court due to the gravity of its culpability and the fact that it was a defect in substance rather than form (see p 110B, E–F).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan keenam untuk pemulangan US$617,756.37, yang merupakan wang diterima daripada pelanggan plaintif dan telah disimpan secara salah oleh defendan keenam dan sejumlah US$501.37 untuk barangan yang dijual dan dihantarkan. Pada mulanya, defendan keenam telah menimbulkan bantahan-bantahan awal untuk menggagalkan permohonan plaintif untuk penghakiman terus. Penolong kanan pendaftar yang bijaksana telah membenarkan bantahan-bantahan awal yang telah ditimbulkan oleh defendan keenam dan membatalkan dengan kos permohonan untuk penghakiman terus. Plaintif telah merayu ke mahkamah ini.

Diputuskan, menolak rayuan tersebut:

(1) Plaintif hanya mengemukakan permohonan penghakiman terus mereka tiga bulan selepas defendan keenam memasuki kehadiran dan dua bulan selepas memfailkan pembelaan. Setelah memulakan guaman terhadap defendan-defendan, barangkali dengan arahan-arahan untuk menggunakan penghakiman terus disokong oleh afidavit-afidavit yang perlu diperolehi dari USA,

plaintif sepatutnya menyediakan kesemua dokumen-dokumen yang relevan untuk mengendalikan kes mereka yang cepat. Ini merupakan pertimbangan yang penting sehubungan dengan amalan litigasi hari ini yang menggalakkan kes-kes diselesaikan dengan cepat. Plaintif telah gagal untuk melepaskan beban atas mereka untuk menunjukkan bahwa kelewatan tersebut dapat dijustifikasikan dalam keadaan-keadaan kes mereka (lihat ms 107D, G–I); *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134 diikut.

(2) Plaintif telah cuba untuk menggunakan apa yang telah diekshibitkan pada dasarnya, sebagai afidavit-afidavit yang menyokong permohonan mereka. Satu-satunya afidavit yang ditenderkan untuk menyokong permohonan tersebut adalah afidavit yang diangkat sumph oleh peguam. Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak mempunyai peruntukan yang membenarkan afidavit-afidavit dikemukakan dalam bentuk ekshibit-ekshibit, dan tidak juga apa-apa peruntukan yang membenarkan seorang plaintif untuk memohon kepada mahkaah dalam satu permohonan A 14 melalui ekshibit-ekshibit sokongan permohonan tersebut. Untuk membenarkan afidavit-afidavit sedemikian dan dibaca untuk menyokong permohonan penghakiman terus plaintif adalah bertentangan dengan peruntukan yang berkaitan itu sendiri (lihat ms 108H–109A, 111F-G).

(3) Beban atas plaintif adalah untuk memastikan keaslian afidavit-afidavit tersebut sebelum apa-apa pertikaian timbul, dan ini mereka telah gagal untuk berbuat demikian. Walaupun ia adalah terbuka untuk plaintif memohon kebenaran mahkamah di bawah A 41 k 4 untuk menggunakan afidavit keterangan yang cacat tersebut, namun beban terletak atas mereka untuk membuktikan satu kes yang meyakinkan untuk kebenaran sedemkian, yang boleh dibenarkan, bergantung kepada sifat dan jumlah dan sebab-sebab ketidakpatuhan borang atau dari segi format. Kaedah 4 peruntukan ini tidak boleh digunakan untuk memulihkan kecacatan atau kesilapan dalam penegasan-penegasan afidavit tersebut yang merupakan tunjang afidavit tersebut, kerana kaedah ini tidak memberikan mahkamah apa-ap budi bicara sedemikian (lihat ms 109E–G).

(4) Kecacatan-kecacatan dari segi bahan dan bukan dari segi format juga telah dikesan. Afidavit ini mengandungi satu satu pindaan yang menyalahi undang-undang dan kelihatan telah diubah. Oleh demikian, meskipun satu permohonan telah dibuat untuk kebenaran menggunakan afidavit ini di bawah A 41 k 4 KMT ia tidak sepatutnya dibenarkan oleh mahkamah disebabkan keseriusan kebersalahannya dan hakikat bahawa ia adalah satu kecacatan dari segi bahan dan bukan dari segi format (lihat ms 110B, E-F).]

Notes

For cases on delay in application for summary judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 5907–5973.

For cases on affidavits, see *Mallal's Digest* (4th Ed, 2001 Reissue), paras 5688–5716.

Cases referred to

Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd and others, Chishty Coveney & Co (a firm) v Raja [1998] 2 All ER 181 (refd)

Banque Nationale De Paris v Wong Hai Ong [2000] 5 MLJ 156 (refd)

CHS, Re [1997] 3 MLJ 152 (refd)

K&N Kenanga Sdn Bhd v Latchman Dass Shewaram [1986] 2 CLJ 136 (refd)

Krishnamurthy & Anor v Malayan Finance Corporation Bhd [1986] 2 MLJ 134 (folld)

McLardy v Slateum [1980] 24 QBD 504 (refd)

Ngoi Thiam Woh v CTOS Sdn Bhd & Ors [2001] 4 MLJ 510 (refd)

Othman Puteh & Anor v Ku Azman Ku Bahari [2002] 7 CLJ 64 (refd)

Perbadanan Nasional Insurance Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)

Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818 (refd)

Public Bank Bhd v Heng Weng Chin & Ors [2002] 6 MLJ 49 (refd)

Ratnam v Cumarasamy [1965] 1 MLJ 228 (refd)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (refd)

Standard Chartered Bank Malaysia Bhd v Eng Song Huat [1996] 1 MLJ 446 (refd)

Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd)

Voon Mow Chen v Menteri Dalam Negeri & Anor [1993] 2 AMR 38 2199 (refd)

Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor [1999] 5 MLJ 180 (refd)

Legislation referred to

National Language Act 1963/67 s 8

Rules of the High Court 1980 O 3 r 5(1), O 14, O 41 rr 1(4), 4, 10(2), 12, O 92 r 1

Rules of the High Court (Amendment) 2002 O 1A or O 2 r 3

Haslina Hassan (*Zaid Ibrahim & Co*) for the appellant/plaintiff.

Richard Lee (*PG Loke* with him) (*Cheah Teh & Su*) for the respondent/sixth defendant.

Vincent Ng J: On 14 June 2002 the learned senior assistant registrar ('SAR') allowed the preliminary objections raised by the sixth defendant's

A solicitor and struck off with costs the plaintiff's application for summary judgment in encl 8.

Hence this appeal (encl 61) before me today.

Without going into much detail, suffice to say, the plaintiff's claim against the sixth defendant was for the return of US$617,756.37, being
B monies received from the plaintiff's customer and wrongfully retained by the sixth defendant and a sum of US$501.37 for goods sold and delivered.

Although at the onset, the sixth defendant raised seven preliminary objections to defeat the plaintiff's application for summary judgment, for the purposes of this appeal, only five of them merit discussion, the total
C effect of which, in my opinion justified the learned SAR's decision.

The first preliminary objection — delay

The following facts are undisputed. The plaintiff commenced this action against the defendants on 31 December 1998. The sixth defendant entered
D their appearance and filed their defence by 4 March 1999. The plaintiff only took out their summary judgment application three months after the sixth defendant entered appearance and two months after the filing of the defence.

The plaintiff's explanation for the delay was contained in their
E supporting affidavits (exh DL 1 encl 8A and encll 8b and 44A). The plaintiff needed time, not only to instruct their solicitors and forward documents but also to coordinate and prepare the supporting affidavits as the plaintiff was based in the United States of America ('USA') whilst the deponents of the supporting affidavits were in both USA and Australia. In light of these circumstances, the plaintiff sought to persuade this court, that
F the delay was not inordinate. I am mindful that delay in recourse to a summary judgment application is not per se fatal.

Aside from the fact that the sixth defendant was disputing the admissibility of the supporting affidavits, the sixth defendant maintained that the explanation on the delay forwarded by the plaintiff was
G unacceptable.

On the delay, I am in agreement with the sixth defendant, as I am bound to follow the decision of the Supreme Court in *Krishnamurthy & Anor v Malayan Finance Corporation Bhd* [1986] 2 MLJ 134. Having commenced the suit against the defendants, presumably with instructions to apply for summary judgment supported by affidavits to be secured from
H USA, the plaintiff should have prepared all the relevant documents for the expeditious conduct of their case.

This is of material consideration in the light of the present day litigation culture which enjoins speedy disposal of cases. The plaintiff had failed to discharge the onus on them to show that the delay was justified under the
I circumstances of their case. (See *McLardy v Slateum* [1980] 24 QBD 504, *K&N Kenanga Sdn Bhd v Latchman Dass Shewaram* [1986] 2 CLJ 136, *Standard Chartered Bank Malaysia Bhd v Eng Song Huat* [1996] 1 MLJ 446

and *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818.)

The second preliminary objection — English affidavits

What is more pivotal to my decision is the sixth defendant's objection to the admissibility of all the affidavits affirmed by David Lee Kim Meng ('Lee'), the plaintiff's solicitor, (encll 8A, 9, 10, 23, 26, 33C, 35 and 44) and the affidavits of Evert Alan Butters ('Butters') exhibited in the former's affidavits (exh 'DL 1' of encl 8A, exh 'DL 2' of encl 9, exh 'DL 2' of encl 10, exhs 'DL A' of encl 23, exh 'DL 4' of encl 26, exh 'DL 5' of encl 33C, exh 'DL 6' of encl 35 and exh 'DL A' of encl 44).

All of Butters' affidavits were affirmed in English with an unaffirmed copy of the same in Bahasa Malaysia attached thereto. These affidavits were annexed to Lee's affidavits as exhibits.

The plaintiff's strategy in adducing Butters' affidavits as exhibits seemed to be two pronged. Firstly, through Lee's affidavits, they explained that neither Butters nor the notary public, before whom he affirmed the affidavits, understood Bahasa Malaysia. Hence, the need to file Butters' affidavits in English and the plaintiff — quite cleverly, they thought — in compliance with O 41 r 10(2) of the Rules of the High Court 1980 ('RHC'), paid the praecipe fee for all of Butters' affidavits.

Secondly, the plaintiff sought to rely on the proviso to O 92 r 1 of the RHC which is as follows:

> Provided that any document in the English language may be used as an exhibit, with or without translation thereof in the national language.

Ingenious as the plaintiff's approach was, I found it flawed and misconceived for several reasons.

Lee's affidavits served no greater purpose other than to circumvent O 92 r 1 of the RHC which provided that any document required for use in pursuance of the RHC shall be in Bahasa Malaysia. (See *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 and s 8 of the National Language Act 1963/67.)

Order 92 r 1 of the RHC is a mandatory provision. The proper way for the plaintiff to adduce Butters' affidavits would have been to:

(i) have the affidavits affirmed in Bahasa Malaysia before a Malaysian consular officer, who would have been able to explain the contents of the said affidavits to Butters; pursuant to O 41 r 12 of the RHC; or

(ii) have the affidavits affirmed in English with the Bahasa Malaysia translation of the same annexed to an affidavit by a translator verifying the translation.

The RHC has no provision that allows affidavits to be adduced in the form of exhibits, and neither is there any provision to permit a plaintiff to move the court in an O 14 application through exhibits in support of the application, albeit clothed as affidavits. To allow such affidavits to be read

in support of the plaintiff's summary judgment application would run counter to the grain of the pertaining provision itself.

It is trite law that a summary judgment application must be supported by an affidavit, verifying the facts on which the claim was based. As such, it should not be allowed to be converted from a contest of affidavits to a contest of exhibits.

The third preliminary objection — jurat

The sixth defendant also maintained that the plaintiff's affidavits, namely, exh 'DL 1' of encl 8A, encl 8a, encl 28 and exh 'DL 5' of encl 33C, were defective because the jurat in these affidavits did not immediately follow the spill over from the last substantive averment.

I had occasion to express the following view in respect of this issue in *Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 2 AMR 38 2199 at p 2204:

> It is this court's view that the reason that the jurat of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition. This is also in order to obviate the possibility of abuse by any party ...

I find no reason to change that view. The onus was on the plaintiff to ensure the authenticity of the affidavits before any dispute arose, and this they failed to do.

Though, in respect of the aforesaid defect in form or format it is open to the plaintiff to apply for leave of the court under O 41 r 4 to use such defective affidavit in evidence, yet the onus rests on them to make out a cogent case for such leave, which could be granted, depending on the nature and number of and the reasons for such non-compliance of form or format. In my opinion, r 4 of this provision may not be invoked to cure a defect or error in the substantive averments of the affidavit which goes to the root of the affidavit, as this rule does not empower the court with any such discretion.

The proper recourse in such cases is to apply for leave (if time has expired) under O 3 r 5(1) to file a further or corrective affidavit, as recommended in *Perbadanan Nasional Insurance Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85.

The fourth preliminary objection — residential address

The sixth defendant also drew the court's attention to encll 8A, 8b and exh 'DL 1' of encl 8A; that is, the first supporting affidavits for the plaintiff's summary judgment application affirmed by Lee, Bruce Moore ('Moore') and Butters respectively.

The deponents failed to state their residential addresses as required under O 41 r 1(4) of the RHC. This requirement is mandatory and the

plaintiff's submission that the deponents had stated their residential addresses in subsequent affidavits did not find favour with me. This defect delivers a fatal blow to the legal integrity of the affidavits, considering that Lee's affidavit was being used as a vehicle to adduce Butters' affidavit. (See *Perbadanan Nasional Insurance Sdn Bhd, Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor* [1999] 5 MLJ 180 and *Ngoi Thiam Woh v CTOS Sdn Bhd & Ors* [2001] 4 MLJ 510).

The fifth preliminary objection — defect in substance

More importantly, defects of substance and not of form only were also detected. The plaintiff's solicitor filed several affidavits, affirmed on 5 May 1999 (encl 8A), 24 June 1999 (encl 9), 1 September 1999 (encl 26), 21 December 1999 (encl 33C) respectively and another affidavit which bore no affirmation date but was filed on 21 July 1999 (encl 10). The date in para 3 of encl 8A was rubber stamped as 5 May 1999 without being endorsed with any initials.

Further, the dates in paras 4 and 19 of exh 'DL 1' (affidavit of Butters) of encl 8A were also rubber stamped 30 April 1999 with neither the initials of the deponent nor the notary public appended thereto. Similarly, the date in para 4 of exh 'DL 5' (affidavit of Butters) of encl 33C had been amended by hand without such endorsements.

I am also mindful of another affidavit sworn by Moore, filed on 25 October 1999. This affidavit bears an illegal amendment and appeared to have been tampered with, as the figure 5 in the date 25th was altered by hand but was not initialled by the deponent and the Commissioner of Oaths, as is required. This being so, even if an application had been made for leave to use this affidavit under O 41 r 4 of the RHC it should not be allowed by the court due to the gravity of its culpability and the fact that it is a defect in substance rather than form. Thus, it may be observed that a truly kaleidoscopic patchwork of errors has occurred in the getting up and management of the application for summary judgment.

Other considerations

The fact that the plaintiff went to the trouble of affirming a corrective affidavit (encl 44A), clearly showed that the plaintiff had sufficient notice of the preliminary objections raised by the sixth defendant. In light of the number of preliminary objections raised by the sixth defendant, to say the least, the plaintiff's failure to make any application under O 41 r 4 of the RHC, for leave of the court to use the defective affidavits (except in passing, as an afterthought, in the written submission before me) or to apply for an extension of time under O 3 r 5(1) of the RHC, to file further or corrective affidavits, was a glaring omission of recognized procedures. Without such application, this court is not empowered to cure the defects, particularly at its own instance. (See *Perbadanan Nasional Insurance Sdn Bhd, Re CHS* [1997] 3 MLJ 152 and *Banque Nationale De Paris v Wong Hai Ong* [2000] 5 MLJ 156.)

A The plaintiff could not rely on O 1A or O 2 r 3 of the Rules of the High Court (Amendment) 2002 which came into effect on 16 May 2002 as the plaintiff's defects in form or format predated the amendments. (See *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292.)

B *Conclusion*

The end result of the sixth defendant's various challenges was not favourable to the plaintiff. On its own, perhaps some of the defects in form or format pointed out by the sixth defendant could be explained away or treated as an irregularity. But when the same were considered as a whole, they had the cumulative fatal effect on the plaintiff's summary judgment C application as they have occasioned prejudice to the due administration of justice.

I reiterate the view I expressed in *Othman Puteh & Anor v Ku Azman Ku Bahari* [2002] 7 CLJ 64 at p 67:

D > I am conscious of the approach that I should take in a preliminary objection on matters of form or procedure. Such preliminary objections should not normally be held to prevail over the merits of the case unless there is blatant infringement of the rules and *such infringement has occasioned prejudice* to the adverse party or *to the due administration of justice* ...
>
> ... if the infringement is significant and the culpability is of a high degree, the E court cannot overlook such conduct without also condoning it and thereby encouraging non-observance and total disregard of clearly expressed rules in general which are meant to be observed. (Emphasis added.)

(See *Ratnam v Cumarasamy* [1965] 1 MLJ 228, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd and others, Chishty Coveney & Co (a firm) v Raja* [1998] 2 All ER 181 and *Public Bank Bhd v Heng Weng Chin & Ors* [2002] F 6 MLJ 49.)

The crux of my ratiocination is as follows.

The plaintiff had attempted to use what were essentially exhibits, as affidavits in support of their application, which is not permissible under the RHC. The sole affidavit tendered in support of the O 14 application was the G affidavit sworn by the lawyer, albeit the three affidavits of the plaintiff sworn in English were put in as exhibits but purported to be affidavits in support.

If the three exhibits were intended to be used as affidavits they were invalid as affidavits, for being made in breach of O 92 r 1 of the RHC. Yet, the plaintiff had sought to use such exhibits as affidavits in support of the O 14 application. The only proper affidavit filed in connection with the O 14 H application by the plaintiff is the affidavit by Moore, the managing director in Australia, affirmed in Malaysia on 23 November 1999 (encl 30); but this affidavit was not an affidavit in support of the application for summary judgment but merely an affidavit in reply to one or two points raised by the sixth defendant in their affidavit affirmed on 9 November 1999.

I After careful consideration of all the affidavits and submissions put in by both sides and for all the above various and variegated reasons, I decided to dismiss the plaintiff's appeal in encl 61 with costs.

A final observation which I wish to make is that, to my amazement, against its own vital interests, the plaintiff has now filed an appeal to the Court of Appeal against this eminently interim decision, which merely involves affidavits to be used in an O 14 application. The plaintiff could not have been unmindful, if well advised, that a very substantial delay in the prosecution of its claim would result, considering that that appeal would, after considerable time lapse, only resolve the question as to whether the said impugned affidavits could be used in the O 14 application. Then, should the plaintiff's appeal be allowed by the Court of Appeal and summary judgment is also allowed by the SAR, an appeal by the sixth defendant to the judge in chambers is envisaged, and (if dismissed) yet another appeal to the Court of Appeal would follow. This, surely, would work to the unexpected benefit and utter joy of the sixth defendant. It is rather, a strange situation, where a defendant is continually happy to be consistently unsuccessful on interlocutories, since the legislative amendment on the word 'decision' has yet to be implemented in civil proceedings. The nation would not survive as a financial entity if the administration of justice grinds to a halt through being clogged up by the sheer weight of unnecessary and frivolous appeals. Thus, the right of every subject to have recourse to the courts in civil cases must be placed in the scales with the legitimate expectation that the nation shall survive economically for the subject.

In postscript, as the plaintiff has lodged an appeal to the Court of Appeal against my decision, I have for obvious reasons issued directions to the SAR to stay the fixing of the suit for case management for trial until the disposal of that appeal.

Appeal dismissed.

Reported by Peter Ling